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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1295

DAVID H. WENGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY

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Petitioner, David H. Wenger, respectfully submits this reply to the brief in opposition, filed herein by respondent on or about June 2, 1972, in order to correct several serious errors of fact, law, and procedure made in that brief.

Petitioner does not accept the paraphrase of the questions presented on page 2 of the brief in opposition* and adheres to the statement of the questions presented on

* Hereinafter cited "b.i.o.".

page 2 of the petition which was filed on or about April 7, 1972.

Necessary corrections of respondent's statement of the case will be made within each point to which they relate.

The numbered sections in this reply correspond to the reasons for granting the writ set forth in the original petition as well as to the headings in the petition's statement of the case and the questions presented.

Since the filing of the petition, the decision of the Court of Appeals for the Second Circuit, reprinted as Appendix A to the petition, has appeared officially in the advance sheets of the Federal Reporter, Second Series, 455 F. 2d No. 2, dated April 24, 1972. *United States* v. *Wenger,* 455 F. 2d 308 (2d Cir. 1972).

1. Deliberate prosecutorial delay

Respondent argues from foreshortened quotations of this Court's recent opinion in *United States* v. *Marion,* 404 U. S. 307, 92 S. Ct. 455 (1971) that this Court has already ruled that the protection of the Sixth Amendment's speedy trial provision is not available to petitioner, since he was not arrested or indicted *in this particular case* as the two years of deliberate prosecutorial delay in returning the indictment after the first grand jury presentation occurred before those events (b.i.o., p. 5). However, in the sentence just prior to that quoted by respondent, Mr. Justice White in his majority opinion wrote:

> "Invocation of the speedy-trial provision thus need not await indictment, information or other formal charge.[12]" 404 U. S. at 321, 92 S. Ct. at 463.

Footnote 12 of this Court's opinion in *Marion* reads:

> "In its Standards Relating to Speedy Trial, n. 10 supra, at 6, the ABA defined the time at which the beginning of the delay period should be computed as:
>
> '. . . the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or *a crime based on the same conduct* or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer.' Rule 2.2.
>
> Under the ABA Standards, after a defendant is charged, it is contemplated that his right to a speedy trial would be measured by a statutory time period excluding necessary and other justifiable delays; there is no necessity to allege or show prejudice to the defense. Rule 2.1, *ibid.*" 404 U. S. at 321 n. 12, 92 S. Ct. at 463 n. 12. (emphasis added)

The prosecution of petitioner was in exactly that posture as will appear more fully, infra. Significantly, respondent does not deny that the tax evasion indictment in the Eastern District of New York and the six subsequent indictments in the Southern District were allegedly on the same conduct and were being treated by all law enforcement agencies involved as unitary (petition, pp. 3-5, 14). Nor can it be denied that petitioner was arrested and held to answer, in 1968, on a Southern District portion of that alleged conduct contemporaneously with the prosecution's presentation to the Eastern District grand jury (petition, p. 14). After a deliberate two year delay of the return of the grand jury indictment, which respond-

ent admits (b.i.o., p. 6), petitioner found himself in exactly the position which this Court in *Marion* found the Sixth Amendment forbade:

> "But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends." 404 U. S. at 320, 92 S. Ct. at 463.

Acknowledging that the two year delay in returning the indictment below was deliberate, respondent attempts to explain it away: "Indictment was delayed to permit petitioner the benefit of administrative review procedures (R. 635-637) and not in order to obtain any unfair advantage." (b.i.o., p. 6). That assertion will not bear analysis.

Presentation of a criminal tax case, as any other criminal case, to a grand jury is the end of the administrative review not the beginning of it. As this Court held in *DiBella* v. *United States*, 369 U. S. 121, 131, 82 S. Ct. 654, 660 (1962):

> "Presentations before a United States Commissioner, Go-Bart Importing Co. v. United States, 282 U. S. 344, 352-354, 51 S. Ct. 153, 156-157, 75 L. Ed. 374, as well as before a grand jury, Cobbledick v. United States, 309 U. S. 323, 327, 60 S. Ct. 540, 542, 84 L. Ed. 783, are parts of the federal prosecutorial system leading to a criminal trial." 369 U. S. at 131, 82 S. Ct. at 660.

The administrative steps for criminal tax cases reviewed by this Court in *Donaldson* v. *United States*, 400 U. S. 517, 534-5, 91 S. Ct. 534, 544 (1971) (b.i.o., p. 6) all take place even prior to referral of the case to the United States Attorney's office let alone presentation to a grand jury.

Treasury Regulations, §601.107(c)(2) provides:

> "(2) The Assistant Regional Commissioner (Intelligence) shall ordinarily notify the subject of an investigation and his authorized representative, if any, when he forwards a case to the Regional Counsel with a recommendation for prosecution. *This rule will not apply if the case is with a U. S. Attorney.*" (emphasis added)

That this case was already "with a U. S. Attorney" when it was presented to the 1968 grand jury is obvious. It is also borne out by the statement of the Special U. S. Attorney to the second grand jury, March 31, 1970, "Q. This case was originally in the organized crime office here and transferred to me in Washington, was it not? A. Yes, sir. Mr. Molenof: No further questions. Thank you." (Jt. Ex. App. A 130a). Mr. Molenof's statement that this case originated in the organized crime* office in the Eastern District of New York ("here") is especially

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* As applied in this case, "organized crime" is a term of art. Petitioner is not a racketeer or other participant in what is commonly referred to as organized crime. The Internal Revenue Manual includes as a part of their "Organized Crime Drive", labor-management cases or cases involving key individuals in pension or welfare trust fund fields. I.R.M. §§4565.1, 4565.2. In such cases the normal avenues of review are closed and the agents are instructed not even to seek a protective waiver of the statute of limitations on *civil* assessments.

pertinent. Indeed the very record references cited by respondent (b.i.o., p. 6) contain an admission by the prosecutor that this case was under the supervision of the Organized Crime and Racketeering Section of the Department of Justice (A 637) (also referred to as "Strike Force" cases) as were the cases against petitioner in the Southern District. In such cases, the policy is *not* to "permit . . . the benefit of administrative review procedures." (b.i.o., pp. 3, 6)*

It is clear that this case originated with the Strike Force in the United States Attorney's office in the Eastern District of New York which presented it to the grand jury in 1968. In another case, which is being handled by the same "Strike Force" in the same district, *United States* v. *Goldstein, supra*, a memorandum was submitted to the Court clearly stating what the government's policy and practice is when the Strike Force presents a case to a grand jury as it did against petitioner in 1968:

> "Thus, in recommending a Grand Jury probe the Special Agent was acting pursuant to long standing Bureau policy. On following such policy there is no provision either in law, regulations or policy that the subject of a Grand Jury probe be given a conference. In fact to offer such a conference would greatly infringe the broad investigative powers of

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* In *United States* v. *Goldstein*, —— F. Supp. —— (EDNY 72 Cr. 18, 5/5/72), p. 19, Judge Judd noted whose "benefit" such conferences when afforded are for: "It is true that a certain number of cases are dropped after each level of administrative conference, but the conferences are primarily for the benefit of the United States, to avoid the expenditure of effort on unfounded prosecution, and not for the benefit of defendants." (Contrast b.i.o., p. 3) Naturally such a determination is made before grand jury submission.

a lawfully constituted Grand Jury." Government's Answer to Defendant Goldstein's Motion to Dismiss The Indictment, p. 4 (72 Cr. 18, EDNY).

"The prosecutor's office is an entity and as such it is the spokesman for the Government." *United States* v. *Giglio*, —— U. S. ——, 92 S. Ct. 763, 766 (1972).

What is clear from the record is that petitioner was not informed at the time he was contacted in 1968 that the case against him had already been presented to the grand jury (b.i.o., pp. 3, 6; A 36).* This is strongly suggestive of the type of practice condemned by this Court in *Massiah* v. *United States*, 377 U. S. 201, 204, 206, 84 S. Ct. 1199, 1202-03 (1964). The only steps that the prosecution below claimed were taken after presentation to the 1968 grand jury were completed in 1968. No showing has been made of any reason why indictment was not then sought from the 1968 grand jury which had already heard live witnesses instead of waiting two years to beguile another grand jury with agent's hearsay except as "an intentional device to gain tactical advantage over the accused." *United States* v. *Marion*, 404 U. S. at 324, 92 S. Ct. at 465. Respondent concedes, *sub silentio*, that the case against petitioner was complete at the time of the 1968 grand jury presentation and that no investigation was carried out thereafter (petition, pp. 4, 12, 13).

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* There was no need to speak with petitioner at this late date. The special agent and revenue agent had commenced their investigation in 1966 by contacting petitioner and obtaining from him all records concerning not only the later questioned transaction but all transactions (A 282-4, 294-5) Revenue Agent Heller, in fact, admitted that it was "possible" at the first meeting with him that petitioner had insisted on an immediate audit of his 1963 return (A 295).

Respondent's citation of *United States* v. *Ewell*, 383 U. S. 116, 86 S. Ct. 773 (1966) (b.i.o., p. 6) is peculiarly inapposite. In *Ewell*, Justice White, speaking for the majority, found the claim of "possible prejudice . . . speculative and premature" 383 U. S. at 122, 86 S. Ct. at 777, since the defendants had not yet been tried on the second indictment. 383 U. S. at 123, 86 S. Ct. at 778. Here the demonstration of prejudice, procedural, situational and evidential, has been made, at trial and after conviction (petition, pp. 4-6, 13-14). Justice Brennan concurred specially in *Ewell* since the government had agreed to abandon the advantage of its oppressive conduct in returning 3 counts to supersede the one dismissed. 383 U. S. at 125, 86 S. Ct. at 779. The deliberate and oppressive conduct practiced against petitioner through delay and a multiplicity of manipulated indictments has been exploited fully.

Respondent apparently overlooks that portion of Justice White's opinion in *Marion*, "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." 404 U. S. at 320, 92 S. Ct. at 463.

2. Subversion of the grand jury

The point is not only that hearsay was used before the grand jury, as respondent would have it (b.i.o., pp. 6-7), serious though that problem is, but the continuation of a practice in securing indictments by deliberately withholding direct witnesses from the grand jury in favor of a hearsay presentation, a practice which the United States Attorneys' Offices in the Second Circuit have admitted is unfair by their repeated representations that they have abandoned it (petition, p. 15).

What renders the incursion on petitioner's right to have his case fairly considered by the grand jury before being held to answer particularly grievous, is that the prosecution did present its completed case to the 1968 grand jury through direct witnesses but deliberately withdrew the case from that grand jury in favor of the perfunctory procedure in 1970 following a two year delay (b.i.o., p. 6).

Not only was this oppressive procedure concealed from petitioner until it inadvertently came out at the trial, it was also concealed from the indicting grand jury in 1970 after concern had been expressed by a grand juror about the staleness of the case. The transcript of the March 31, 1970 grand jury proceedings show:

> "Mr. Molenof: Any questions.
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> Juror: When did you start this investigation?
>
> The Witness: The case was assigned to me June 3, 1966.
>
> Juror: Five years ago?
>
> The Witness: About four years ago. A little under four years.
>
> Q. Is it unusual for long investigations in these cases? A. Usually investigations are completed within a period of two to three years depending on the intricacies involved.
>
> Q. This case was originally in the organized crime office here and transferred to me in Washington, was it not? A. Yes, sir.
>
> Mr. Molenof: No further questions. Thank you." (Jt. Ex. App., A 129a-30a)

The response of the prosecutor and the Special Agent to the grand jury inquiry was quite misleading. When a

jury wishes to investigate the staleness of a claim or the reasons for prosecutorial delay which may prove oppressive, its attempt to do so should not be subverted. The grand jury is an independent instrument of law enforcement and its interest in prompt law enforcement is as important as it is to the courts, the defendants and the public at large. It should not be thwarted. Nor should its plenary powers of investigation be curtailed by the unnecessary submission to it of a case on the eve of the expiration of the statute of limitations so that it cannot seek direct evidence.

Had the 1970 grand jury been told that there was a prior grand jury investigation in 1968 but no indictment was sought, as is now represented, the grand jury may well have made further inquiry. Had the 1970 grand jury been informed that earlier grand jury had heard direct witnesses, it may very well have directed that those witnesses be called so that it could evaluate their testimony as to events then seven years in the past. Had the prosecution called direct witnesses before the 1970 grand jury it would very likely have been revealed that those witnesses had previously appeared in 1968 and thus allowed the grand jury to make further inquiry into the delay and its effect on the case and, possibly, upon the defendant. For the prosecution to foreclose this by giving the less than frank representation that all that had happened after the investigation was completed was that the case which had originated in the Eastern District of New York had been transferred to Washington (Jt. Ex. App. A 130a) was to deny petitioner the right not to respond to charges unless they were returned by an unfettered grand jury. See *Russell* v. *United States*, 369 U. S. 749, 770-1, 82 S. Ct. 1038, 1050-1 (1962).

3. The Hearsay Tainted Verdict

Respondent does not argue that the trial court's instructions to the jury that the highly damaging hearsay testimony as to statements made by then co-defendant Semel out of petitioner's presence were admissible only as to Semel were sufficient or anything other than error under *Bruton* v. *United States*, 391 U. S. 123, 126, 138, 88 S. Ct. 1620, 1622, 1625 (1968). Indeed, it is difficult to see what if any justification respondent advances for the rulings below.

The "confrontation right" was not preserved (b.i.o., p. 7) since for the purposes of this case Semel was not the declarant whom Edward Handy described. His testimony as a prosecution witness in no way touched upon the supposed conversations with Edward Handy in Semel's office on September 6, 1963 and, indeed, did not even touch upon the events of that day. To say that a defendant's right of confrontation is preserved by forcing him to reintroduce hearsay, excluded from the case entirely at that point, simply in order to cross examine an alleged declarant is, as a practical matter, to make hearsay available to the jury in every case no matter what instructions the trial court gives, a result directly contrary to *Bruton*, 391 U. S. at 138, 88 S. Ct. at 1629.

Respondent seems to feel it is significant that the jury's request in its second day of deliberations for a rereading of Handy's hearsay described that testimony as *Semel's* (b.i.o., p. 7, n. 4). We agree but for different reasons. The jury's description of the Handy hearsay—and the request was inescapably for that because he was the only witness at the trial who testified that he had been asked to come earlier than the others to Semel's office (Compare A 571 with A 39-40)—as being Semel's

own testimony and not Handy's excluded hearsay, conclusively demonstrates that the jury was not able to perform the mental gymnastic indulged in by the Court and counsel of distinguishing between an out of court accusation and direct testimony as this Court feared in *Bruton*.*

4. Disclosure, the Antithesis of Concealment

The sole case cited by respondent as a justification for this unprecedented single year tax evasion prosecution based solely on an item disclosed on the return is *United States* v. *Bursten*, 453 F. 2d 605 (5th Cir. 1971) (b.i.o., p. 8). In that case, (the facts appear at 395 F. 2d 976, 979 (5th Cir. 1968)), the defendant claimed a *loss* carryover of $140,000 which he admitted was false and which the prosecution claimed was used to conceal a transaction wholly omitted from the return. To that extent, it was, like *Sansone* v. *United States*, 380 U. S. 343, 344, 85 S. Ct. 1004, 1006 (1965), a case where the taxpayer left the crucial transaction off the return in question thus effectively concealing it from the Internal Revenue Service.

In this case, petitioner disclosed the transaction on his return and did so in such a manner, the examining Rev-

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* The prejudicial nature of the Handy testimony, presumed under the *Bruton* rule, is manifest on this record. In that testimony and that testimony alone, the jury was told that Semel asked Handy to come early to the closing on the loan, the alleged finder's fee for which Handy allegedly had in his pocket in the form of a check to Wenger. When Handy complied, Semel allegedly told him that the check was not acceptable and instead the finder's fee was to be paid in the form of a sale of antiques at a price reduced by the amount of the finder's fee (A 40-1, 43-4). The jury was instructed by the court to close its ears to this testimony. That it could not, is shown by its request shortly before verdict to have *Semel's* testimony (there was none) as to these events reread.

enue Agent himself testified, as was sufficient to make it stand out from all the other capital gain transactions reported on petitioner's return and put the agent on notice to make further inquiry (A 296-7, 302). Nothing further is required of any taxpayer. *Spies* v. *United States*, 317 U. S. 492, 496, 498, 63 S. Ct. 364, 367-8 (1943). The most that the prosecution could complain of below was that the single questioned transaction should have been reported on one page rather than another of the return or described as "ordinary" ordinary income rather than as a *short-term* capital gain (which is also treated as ordinary income). This is the stuff that notices of deficiency and Tax Court cases are made of.

Petitioner neither expects nor seeks a review of the facts of this case. However, respondent's failure to mention certain salient facts, elicited from the government's own witnesses at trial reveals that what the prosecution has all along done in this case is to substitute adverbs for substantive proof.*

Petitioner was introduced to the president of the many Handy corporations, John Handy, by Semel, the attorney and tax adviser to Handy and his corporation as a prospective outside accountant (A 90-1, 403-4). Handy and his corporations were in the business of executive recruitment, which involved, inter alia, persuading persons to undertake new employment relationships by devising plans, with the aid of Semel, to give those persons substantial capital gains (A 30, 65-7, 72-4, 76-8, 403, 426; Ex. A). It was not contended that anything was wrong with this "tax avoidance" aspect of their business except

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* E.g.: "Attempts to evade tax by *falsely* claiming capital gains or losses are not uncommon." (b.i.o., p. 8, emphasis added, citing a single inapposite case).

insofar as it involved petitioner and then only as to him (A 76-8, 426-8). On his own personal tax return, reviewed by his attorney Semel, John Handy deducted his end of the very same antique transaction with petitioner as a capital loss on his return,* unquestioned by I.R.S. even though it was admittedly overstated (A 263-4, 332-3, 470-1, 479-81, 488-9). Petitioner on the other hand, the subject of an intensive "Strike Force" investigation, was not permitted to rely on Semel's advice as to the capital gain nature of this transaction even though Semel was known to petitioner as a tax-expert not only in his relationship with Handy and his corporations but also because Semel had in prior years issued tax opinions to clients of petitioner (A 426-7).

Contrary to the implication of page 8 of the brief in opposition, no "elaborate investigation" by the agents was necessary into this single transaction, since petitioner gave them all the documents and requested an immediate commencement of an audit (A 282-4, 294-5), unless under the rubric of "elaborate investigation" is meant the following:

(1) John Handy's return was accepted as filed (A 479-82);

(2) The Handy income tax liability, delinquent for a decade in many thousands of dollars, was closed out with a credit after the Special Agent had recommended criminal prosecution against petitioner and Edward Handy had testified before the 1968 grand jury in this case (A 134, 373, 383, 392-3, 602; Ex. FF).

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* Admittedly petitioner had nothing to do with the Handy return or, indeed, with the books and records of Handy or his corporations (A 222, 224-6, 264, 315-16).

(3) The concealment of corporate assets, the corporate discharge of John Handy's personal debts, the personal use of corporate assets (whose greatly increased market value was undisclosed) by John Handy, at a time when he and his corporations were grossly delinquent in taxes warranted a criminal investigation which was not made (A 384-5).

(4) If the same standards were applied to John Handy as are applied to other taxpayers by I.R.S., his *tax,* just on his 1963 return, was understated not less than $17-18,000. as against a reported *taxable income* of $1,097.53 (A 490-91, 493). No known action was taken against him.

What respondent evidently seeks in this case, is that this Court by its silence, at least, will allow unfettered discretion, in such cases as *ad hoc* prosecutorial groups may choose, to convert the rule of law into a rule of rhetoric. See *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 91, 41 S. Ct. 298, 300-01 (1921). It is respectfully submitted that should not be allowed.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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